Supreme Court, U.S.
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No. 95-OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAPTAIN YOLANDA HUET-VAUGHN,
UNITED STATES ARMY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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(On behalf of the
NATIONAL EMERGENCY
CIVIL LIBERTIES COMMITTEE)

December 22, 1995

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QUESTION PRESENTED

Whether depriving a criminal defendant charged with a specific intent crime of her right to testify and present other evidence concerning her intent marks an unacceptable departure from established standards of due process and negates an essential element of the specific-intent crime of desertion.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The United States
Captain Yolanda M. Huet-Vaughn

Petitioner Captain Yolanda M. Huet-Vaughn is an individual and hence has no parent companies, subsidiaries or affiliates.

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Captain Yolanda M. Huet-Vaughn petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The September 28, 1995 decision of the United States Court of Appeals for the Armed Forces is reported at 43 M.J. 105 (C.A.A.F. 1995). (7a.)[1/] The January 25, 1994 decision of the Army Court of Military Review (now the Army Court of Criminal Appeals) on reconsideration is reported at 39 M.J. 545 (A.C.M.R. 1994). (38a.) The October 29, 1993 decision of the ACMR, which was vacated upon that court's reconsideration, was unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Services was rendered on September 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this petition are set forth in the appendices attached hereto. (1-6a.)

INTRODUCTION AND STATEMENT OF THE CASE

Captain Yolanda Huet-Vaughn is a physician and mother of three who joined the Army Reserves in June, 1990, shortly before Iraq invaded Kuwait in August 1990. In civilian life,

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1/ References to "___a" are to pages of the appendices to this petition.

Captain Huet-Vaughn practices medicine in Kansas City, Kansas, serving a relatively poor community and frequently offering her medical services to patients at reduced or no cost. Captain Huet-Vaughn was charged with desertion after she absented herself from the army from December 31, 1990 until February 2, 1991, when she voluntarily returned to military custody. The single charge against her was "desertion with intent to avoid hazardous duty or to shirk important service" in violation of Article 85 of the Uniform Code of Military Justice ("U.C.M.J."), 10 U.S.C. § 885. Captain Huet-Vaughn pleaded not guilty to this charge.

Captain Huet-Vaughn did not dispute that she was absent from the armed forces without leave (a lesser included offense of desertion), but maintained that she lacked the intent required for desertion. Nonetheless, a general court-martial convicted her of desertion in August, 1991, and she was sentenced to dismissal from the service, confinement for 30 months, and forfeiture of all pay and allowances. The convening authority reduced the period of confinement to 15 months on December 3, 1991.

Although desertion is a specific intent crime, requiring the accused to have had the intent to avoid hazardous duty or to shirk important service, the military judge presiding over Captain Huet-Vaughn's court-martial proceedings repeatedly ruled (and instructed the members of the court-martial accordingly) that evidence of Captain Huet-Vaughn's intent in absenting herself from duty was irrelevant to her prosecution. The judge excluded both the testimony of Captain Huet-Vaughn and her proposed witnesses on the issue of her intent.

After her conviction, Captain Huet-Vaughn remained in custody for approximately eight months until April 6, 1992, when the Deputy Assistant Secretary of the Army for the Department of the Army Review Boards and Equal Opportunity Compliance and Complaints Review ordered her release, and remitted the remainder of her sentence.

Captain Huet-Vaughn appealed her conviction to the United States Army Court of Military Review (hereinafter "ACMR") which set aside the conviction and sentence on October 29, 1993. The government moved for reconsideration and, on January 25, 1994, the ACMR on reconsideration again ruled in Captain Huet-Vaughn's favor.

The Judge Advocate General certified the case to the Court of Appeals for the Armed Forces (previously the Court of Military Appeals) (hereinafter "CAAF") under 10 U.S.C. 867(a)(2), and that court reversed the decision of the ACMR on September 28, 1995.

A. The Trial

The government filed two motions *in limine* prior to Captain Huet-Vaughn's trial. The first sought to exclude from evidence "any documentary or testimonial evidence of any sort during the case on the merits concerning the accused's alleged status as a conscientious objector; the dictates of her conscience, religion or personal philosophy; her pattern of belief concerning the Persian Gulf conflict and war generally; and her world views." (10a.) The ostensible grounds for this motion were that the evidence was irrelevant and that it "would confuse the issues, mislead the members, or be a waste of time." (10a.) The second motion sought to exclude "any documentary or testimonial evidence of any sort . . . concerning the legality of the conflict in the Persian Gulf or the legality of Presidential authority to order members of the armed forces to Southwest Asia." (10-11a.) The government argued that the legality of the war was an irrelevant political question. (11a.)

Captain Huet-Vaughn argued that the evidence sought to be excluded by these motions was relevant to her defense that she did not intend to avoid hazardous duty or shirk important service, because it showed that her intent was instead to speak out and expose to the Congress and the American public what she reasonably believed to be an impending catastrophe in terms

of human life, health and the environment as well as impending violations of international law, all in an effort to prevent the outbreak of hostilities. (58-73a.) The evidence was also relevant to prove that Captain Huet-Vaughn honestly and reasonably believed international law, including the Nuremberg principles, prohibited her from participating in violations both of international law and her oath as a physician, and that her intent was to seek to prevent such violations from occurring.

The military judge granted both the government's motions, ruling that Captain Huet-Vaughn's reasons for leaving her unit were irrelevant, as long as the foreseeable effect of her actions was that she would avoid the specified duty. (58a.) The court rejected Captain Huet-Vaughn's arguments that she was entitled to introduce evidence concerning her specific intent at all relevant times. (64-69a, 82-86a.)

Pursuant to its ruling, the court also denied Captain Huet-Vaughn's requests to subpoena and depose numerous witnesses (74-82a), thereby precluding her from calling and examining witnesses (*see, e.g.*, 119-20a), or introducing documentary evidence which would tend to show her actual specific intent (and thus contest one of the elements of the charged offense).

The military judge repeatedly restricted Captain Huet-Vaughn's own testimony regarding what her intent was when she left her unit. An example of the judge's rulings follows:

> Q. . . . What was your intent at the time you went AWOL?
>
> A. My intent at that time was--to expose the nature of what I knew--
>
> TC: Objection Your Honor.
>
> MJ: Restate your question.

* * *

Q: Was your intent at the time you went AWOL for the purpose of avoiding hazardous duty or important service in the Persian Gulf?

A: No, it was not.

Q: What was your intent.

A: My intent at--at the time that I left was to withdraw my consent from what I saw as an illegal and--and totally unnecessary catastrophe.

TC: Objection, Your Honor.

MJ: Sustained, sustained.

(106-08a; *see also* 101-02a, 112a, 113a.) Defense counsel was not permitted to ask the question again, and Captain Huet-Vaughn was not permitted to testify as to what her intent had been. (108-11a.)

On cross-examination, the prosecution asked Captain Huet-Vaughn directly whether she "left Fort Riley so [she] wouldn't have to support Operation Desert Storm or Desert Shield." (113a.) When she responded by explaining her intent, the prosecution objected and asked her to just respond yes or no. (114a.) Captain Huet-Vaughn then testified that she did not leave to avoid deployment to Southwest Asia. (113-16a.)

Not only did the court's rulings preclude Captain Huet-Vaughn from calling witnesses or introducing evidence tending to prove that she did not act with the intent to avoid hazardous duty, but the military judge instructed the members of the court that it *could not* consider any such matter as part of Captain Huet-Vaughn's defense. For example, during voir-dire of the jury members, when defense counsel asked a potential member

whether he would be willing to consider "matters of conscience" both on the merits and on the sentence, the judge instructed: "I --don't answer that question. I've already instructed them that matters of conscience are not to be considered on the merits." (91a.) During direct examination of Captain Huet-Vaughn, when the prosection objected to a question about how she came to have reservations about military operations in the Persian Gulf, the judge stated:

> Well, if what you're trying to get from her is what her--her moral approach was to this, her religious approach, and her personal philosophies with regard to what was going on, I've already explained to the court and--and to you that those are in no way a defense to this, and *therefore they're not relevant.*

(101a (emphasis added).) The judge also instructed that:

> To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, personal philosophy, ethical or professional considerations, is not a defense. Any belief by the accused that what she might have been required to do could have been in violation of international law is not a defense.

(120a.)

The military judge similarly refused a specific instruction requested by Captain Huet-Vaughn that:

> [i]t is a defense in this case that the accused did not intend to avoid hazardous duty or shirk

> important service and instead had a different intent.

(120-21a.)

B. The Decision of the Army Court of Military Review

The Army Court of Military Review reversed Captain Huet-Vaughn's conviction, concluding that the military judge "severely hampered appellant's defense strategy to contest the specific intent element of desertion" and holding accordingly that "the military judge committed prejudicial error when he restricted the appellant from testifying and presenting other evidence of motive to contest the element of specific intent charged in the desertion offense." (54-55a.)

The ACMR found that the military judge never permitted Captain Huet-Vaughn to "go beyond a sketchy summary" as she attempted to explain her intent. (47a.) Holding that, "[w]hile evidence of her motive is not an affirmative defense to desertion, it may be considered by the trier of fact to determine whether the appellant had the specific intent charged in the desertion offense, i.e. to avoid hazardous duty or shirk important service" (54a), the ACMR noted that:

> Of the ten government witnesses who testified on the merits, [two] testified to oral statements made by the appellant to prove that the appellant intended to avoid hazardous duty or shirk important service. None of the appellant's eighteen witnesses who testified on the merits, however, were allowed to testify in any manner that would contest the element of intent.

(46-47a.)

The ACMR cited to sixteen cases decided by the military courts over "the past forty-two years where an accused charged with desertion pled not guilty and presented evidence on the merits in an effort to contest or explain that his intent was other than to remain away permanently [an intent which Captain Huet-Vaughn was not charged with having], or to avoid hazardous duty, or to shirk important service." (52a.)

C. The Decision of the Court of Appeals for the Armed Forces

Ignoring--and in effect overruling--decades of military-law precedent (cited in the AMCR's decision), permitting those accused of desertion to testify to and explain their intent, the Court of Appeals for the Armed Forces held that "the military judge did not err in ruling that CPT Huet-Vaughn's motives were irrelevant to the question whether she quit her unit with intent to avoid hazardous duty or shirk important service." (30a.)

In so holding, the CAAF relied on a section of the Manual for Courts Martial (hereinafter "M.C.M.") explaining an entirely different charge, "wilfully disobeying superior commissioned officer," which states that "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order." (33a.) *See* M.C.M. Part IV, § 14c(2)(a)(iii) (1984, as amended 15 Nov. 1990). (5-6a.)

One member of the CAAF dissented in part, believing that "it was error for the military judge to prevent CPT Huet-Vaughn from explaining her state of mind at the time she left her unit" because "under our case law CPT Huet-Vaughn's mental processes were relevant to determine whether she had an intent to avoid hazardous duty or shirk important service . . . ." The dissenting court member, however, believed that the military judge's error was harmless. (36-37a.)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS FOR THE ARMED FORCES LAYS DOWN AN EVIDENTIARY RULE FOR ALL MILITARY DESERTION PROSECUTIONS WHICH DEPARTS FROM ESTABLISHED DUE PROCESS STANDARDS AND IMPROPERLY NEGATES AN ESSENTIAL ELEMENT OF THE CRIME.

The CAAF's decision approving the military judge's ruling *in limine* now requires the government to prove only that a defendant accused of desertion knowingly missed hazardous duty or important service, eliminating the statutory requirement that the government prove that the defendant harbored a specific intent to avoid hazardous duty or important service. This short cut to proof of guilt is directly analogous to the outlawed jury instruction that a defendant is presumed to intend the natural and probable consequences of her actions, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); once it is shown that the accused knew that she was required for hazardous duty or important service and missed such duty or service, her specific intent to avoid the duty or service is presumed and she has no right to testify otherwise.[2/] Because the judge created an impermissible presumption of intent, he precluded Captain Huet-Vaughn from testifying fully herself or presenting the testimony of her witnesses on the question of her intent. She was thus prevented from contesting the government's contention that she intended to avoid hazardous duty or shirk important service.

Although the statutory definition of desertion requires that a defendant have acted with the intent to avoid hazardous

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[2/] Simply to state this proposition is to expose its error. *See, e.g.*, *United States* v. *Conales*, 744 F.2d 413, 434 (5th Cir. 1984) ("the trial court may under *no* circumstances withdraw any element of an offense from the jury's consideration in a criminal case").

duty or to shirk important service, the CAAF's decision now encourages military courts to prevent defendants from contesting this essential element of the offense. If the CAAF's decision is followed, as it must be, by the lower military courts,[1] a defendant's specific intent is thus henceforward effectively presumed in desertion cases.

Desertion is a serious offense, punishable in time of war by death and at other times by imprisonment for up to five years, dishonorable discharge and forfeiture of pay. 10 U.S.C. § 885(e), U.C.M.J. Art. 85, M.C.M. Part IV, § 9. Thus, under the CAAF's decision, an individual could be put to death for the crime of desertion without an opportunity to stand before the trier of fact and testify what her actual intent was when she missed the duty at issue. This perversion of hitherto settled law should not stand as precedent for future military prosecutions.

1. The CAAF's Decision Violates Established Due Process Standards By Permitting Military Courts To Exclude Evidence Concerning The Intent Of One Accused Of Desertion, Although The Government Is Statutorily Required To Prove Specific Intent In A Desertion Prosecution.

The government was required to prove five elements in prosecuting Captain Huet-Vaughn for desertion: (1) that she quit her unit, organization or other place of duty; (2) that she did so with the intent to avoid a certain duty or shirk a certain service; (3) that the duty to be performed was hazardous or the service important; (4) that she knew that she would be required

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[1] *See, e.g.*, *United States* v. *Jones*, 23 M.J. 301, 302 (C.M.A. 1987) ("a Court of Military Review is not generally free to ignore our precedent"); *United States* v. *White*, 39 M.J. 796, 804 (N.M.C.M.R. 1994) ("[a] Court of Military Review is bound to follow precedent established by . . . the United States Court of Military Appeals").

for such duty or service; and (5) that she remained absent until the date alleged. M.C.M. Part IV, § 9b(2). (2-3a.)

Thus, one of the elements that the government was expressly required to prove was that Captain Huet-Vaughn acted with the specific intent to avoid hazardous duty and/or important service. *Cf. United States* v. *Guest*, 383 U.S. 745, 760 (1966) (in prosecution under 18 U.S.C. § 241, specific intent to interfere with federal right to interstate travel must be proven and jury must be so instructed; mere conspiracy to rob an interstate traveler would not violate the statute absent the specific intent). Captain Huet-Vaughn's defense was that she did not act with the intent to avoid hazardous duty or important service, but the military judge severly curtailed her ability to testify as to her true intent or to present other evidence in support of this defense.

A. The CAAF's decision contravenes due process standards entitling a criminal defendant to present evidence relevant to the defense.

The CAAF's decision--which now sets forth the standard for all courts martial to follow in prosecutions for desertion--departs startlingly from principles of due process so long established by this Court as to have seemed beyond question. The CAAF simply disregarded the fact that a defendant's right to present evidence to contest all elements of a criminal charge has for decades been recognized as fundamental to due process. Alarmingly, the court's decision now sets forth a new lower due process standard for military desertion prosections than is generally applicable to other criminal prosecutions. In approving the military judge's prohibition of Captain Huet-Vaughn's evidence on intent, the CAAF placed a constitutionally unacceptable limitation on the fact finder's basic ability to "decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967).

It is fundamental that due process guarantees the right to present an effective defense. This right is "basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948) (footnote omitted).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, *the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.* Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. *Texas*, 388 U.S. at 19 (emphasis added). The Sixth Amendment to the United States constitution and the due process clause of the Fifth Amendment vouchsafe a criminal defendant the right to defend a charge "in a manner now considered fundamental to the fair administration of American justice--through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses and the orderly introduction of evidence." *Faretta* v. *California*, 422 U.S. 806, 818 (1975).

In *Washington*, this Court struck down a state rule which excluded the testimony of individuals charged as principals, accomplices, or accessories in the trial of another accused of the same crime. In *Webb* v. *Texas*, 409 U.S. 95, 98 (1972) (*per curiam*), this Court summarily reversed a conviction where the trial judge's threatening remarks effectively prevented the defendant's sole witness from testifying. In *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), this Court held that a prohibition on the defendant cross-examining a witness who had

signed but then repudiated a sworn confession, and on the defendant calling witnesses to corroborate that confession, denied the defendant "a trial in accord with traditional and fundamental standards of due process."

The basic principle of these and scores of other cases is simple: a defendant "is constitutionally entitled to have the court accept in evidence any proffered testimony which is both admissible and vital to his defense." *Rosario* v. *Kuhlman*, 658 F. Supp. 1408, 1413 (S.D.N.Y. 1987), *aff'd*, 839 F.2d 918 (2d Cir. 1988). Captain Huet-Vaughn was thus entitled--indeed constitutionally guaranteed the right--to defend herself by contesting any or all of the elements of the desertion offense with which she was charged, including the intent element. *Cf. Morissette* v. *United States*, 342 U.S. 246, 274 (1952) (the trial court may not withdraw or prejudge the issue [of intent]"). She was not, however, permitted to do so. Moreover, the judge's error took the most egregious form possible by abridging Captain Huet-Vaughn's own testimony about her intent.

B. The CAAF's decision contravenes established federal criminal jurisprudence on the issue of intent.

The CAAF's decision not only contravenes general standards of due process in criminal trials, but also goes against established law on the particular question of a defendant's right to present evidence concerning his or her intent. A determination of whether an accused acted with the requisite intent for conviction must be determined "*not only from the act* . . . but from that together with defendant's testimony and all of the surrounding circumstances." *United States* v. *Morissette*, 342 U.S. 246, 276 (1952) (emphasis added). The accused must be allowed to testify, and the surrounding circumstances must be fully elucidated for the jury since intent "ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind." *United States* v.

Simmons, 610 F. Supp. 295, 302 (D.C. Tenn. 1984), *aff'd*, 756 F.2d 453 (6th Cir. 1985).

This Court has unequivocally stated that, "It goes without saying that matters of intent are for the jury to consider." *McCormick* v. *United States*, 500 U.S. 257, 270 (1991).[4/] Other courts have, of course, agreed with this truism. *See, e.g.*, *United States* v. *Toro*, 840 F.2d 1221, 1231 (5th Cir. 1988) ("whether the defendant had the criminal intent required for conviction is a jury issue"); *United States* v. *Malsom*, 779 F.2d 1228, 1233 (7th Cir. 1985) ("[w]hether or not the necessary intent was established is in all cases a question for the trier of fact to resolve"); *United States* v. *Henry*, 749 F.2d 203, 213 (5th Cir. 1984) ("criminal intent is a 'subjective determination,' an 'issue for the jury to resolve on the basis of circumstantial evidence under the totality of the circumstances'") (quoting *United States* v. *Greenfield*, 554 F.2d 179, 183 (5th Cir. 1977)). As a necessary corollary to the rule that issues of intent are for a jury to decide, a trial judge may never enter a directed verdict in a criminal case, "regardless of how overwhelmingly the evidence may point in that direction." *Connecticut* v. *Johnson*, 460 U.S. 73, 84 (1983) (citing *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)).

The importance of allowing an accused to present evidence concerning her intent was established in the seminal case of *Morissette* v. *United States*, in which this Court held it impermissible to withhold evidence of a defendant's intent

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4/ Even in civil cases, courts have held that any and all evidence that might bear on intent should usually be submitted to a jury. *See, e.g., In re Air Disaster at Lockerbie, Scotland On December 21, 1988*, 37 F.3d 804, 819 (2d Cir. 1994) ("[n]o evidence which bore event remotely on [state of mind] should have been kept from the jury, unless it interjected tangential and confusing elements which clearly outweighed its relevancy"), *cert. denied*, __ U.S. __, 115 S. Ct. 934 (1995); *Vinieris* v. *Byzantine Maritime Corp.*, 731 F.2d 1061, 1064 (2d Cir. 1984) (same).

when, as in the case of a desertion prosecution, such intent is an element of the crime charged. In *Morissette*, the defendant was convicted of converting government property after he removed spent bomb casings from a practice bombing range. This Court reversed the conviction, holding that the government failed to prove the necessary intent where Morissette might have believed that the spent casings were simply unwanted junk rather than "property" of the United States, and therefore might not have had the intent to convert government property. The Court found that in such circumstances the existence of a defendant's intent "is a question of fact which must be submitted to the jury." 342 U.S. at 274. *See also Rose* v. *Clark*, 478 U.S. 570, 582 n. 11 (1986) ("the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court"); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435 (1978) ("[intent] is not be taken from the trier of fact through reliance on a legal presumption of wrongful intent").

In *United States* v. *Kelly*, 888 F.2d 732 (11th Cir. 1989), the court held similarly that a lawyer charged with aiding and abetting a client and conspiring with the client to possess cocaine should have been permitted to testify that he believed his professional obligations required him to act as he did. The trial court excluded this evidence as irrelevant, but the appellate court reversed on the grounds that the evidence "was very relevant to [the defendant's] intent and state of mind," and formed "the basis of his primary defense." *Id.* at 743. The same is true of Captain Huet-Vaughn's testimony concerning her motives and belief that her professional obligations required her to act as she did.

Under the holdings of *Morissette* and *Kelly*, Captain Huet-Vaughn should have been permitted to testify as to her intent, and her witnesses should have been allowed to testify as to "all of the surrounding circumstances." A trial court's discretion to exclude evidence "'does not . . . extend to the exclusion of crucial relevant evidence necessary to establish a

valid defense.'" *Kelly*, 888 F.2d at 743. The CAAF's decision permits the trier of fact to make the determination of an accused deserter's intent from little more than the act of being absent itself.

The CAAF relied on *United States* v. *Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987), which, however, has very little bearing on Captain Huet-Vaughn's case. (30a.) *Kabat* did not address the question whether a defendant's evidence should or should not be admitted. Rather, the defendants in *Kabat* challenged the sufficiency of the government's evidence on the issue of intent, after they, unlike Captain Huet-Vaughn, had been permitted to introduce their own evidence on the issue. In addition, *Kabat* discusses the specific intent required under an entirely different statutory provision than that involved in this case, which requires the intent to "injure, interfere with, or obstruct the national defense." 18 U.S.C. § 2155. The defendants in *Kabat* admitted that they acted with the intent to disarm nuclear weapons; thus, unlike Captain Huet-Vaughn, they admitted having the intent required by the statute.[5/]

Captain Huet-Vaughn was thus not similarly situated to the defendants in *Kabat*; her situation is far more analogous to the defendant in *Morissette*. While Captain Huet-Vaughn

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[5/] Although the defendants in *Kabat* did attempt to argue that they lacked the requisite intent--on the ground that they believed that disarming the weapons would assist the national defense in some generalized way--the court held that "national defense" under the statute meant the government's chosen "activities of national preparedness" and not some more subjective idea of the country's well being. Consequently, the defendants' admitted specific intent to disarm weapons fell within the definition of an intent to interfere with the national defense and the defendants therefore had plainly and simply admitted that they acted with culpable specific intent. In contrast, Captain Huet-Vaughn has always maintained that she did not act with the culpable specific intent to shirk hazardous or important duty.

admitted her absence from her unit, she did *not* concede that she specifically intended to avoid hazardous duty and shirk important service and then merely seek to explain why. Here, as in *Morissette*, while Captain Huet-Vaughn's conduct (quitting her unit) might be probative on the issue of intent, it was certainly not dispositive; rather, it could have been rebutted through, *inter alia*, the introduction of motive evidence. This is precisely the holding of *Morissette*. There, the district court believed the fact that the defendant was found with the spent bomb casings in his truck was dispositive on the question of criminal intent. This Court categorically stated that such an assumption was incorrect:

> That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property.

342 U.S. at 276 (emphasis in original).

C. The CAAF's decision is a dramatic departure from prior military jurisprudence.

The military judge's inexplicable limitations on evidence about Captain Huet-Vaughn's intent when she left her unit was also an anomaly in military law. By approving that ruling, however, the CAAF has now encouraged all military courts to exclude evidence of this element of a desertion charge in a manner inconsistent with this and other federal courts' jurisprudence. As the ACMR noted in its opinion, citing sixteen cases spanning forty-two years, historically an individual accused of desertion has been allowed to present evidence to explain that his or her intent was "other than to remain away

permanently, or to avoid hazardous duty, or to shirk important service."[6/] (52a.)

This is because an individual who *intentionally* leaves a unit engaged in hazardous duty or important service, but does so without the specific intent to avoid the hazardous duty or important service, may have committed the offense of being absent without leave ("AWOL"), but has not deserted. AWOL is a lesser included defense of desertion, M.C.M. Part IV, § 9d, with desertion's specific intent requirement distinguishing between the two charges. *See, e.g., United States* v. *Apple*, 2 U.S.C.M.A. 592, 594, 10 C.M.R. 90, 91 (1953); *United States* v. *Williams*, 10 C.M.R. 219, 221 (A.B.R. 1953).

"*As a matter of law*, the offense of desertion is not committed by reason of a naked unauthorized absence, without more, from a unit engaged in hazardous duty." *United States* v. *Apple*, 2 U.S.C.M.A. 592, 593, 10 C.M.R. 90, 91 (1953) (emphasis in original). Thus, as the ACMR correctly noted, citing *United States* v. *Guthrie*, 12 C.M.R. 299, 302 (A.B.R. 1953), intent in a desertion case does not necessarily exist merely because an absence is proven. (49a.) Rather, "proof is permissible to show that a different intent existed." *Guthrie*, 12 C.M.R. at 302 (citations omitted).

Furthermore, courts of military review have consistently held that when an accused has introduced evidence of a contrary intent which is believed by the fact finder, a desertion conviction will not stand. *See, e.g., Apple*, 2 U.S.C.M.A. 592, 10 C.M.R. 90 (if trier of fact believed that accused left to clear up confusion regarding rotation obligation, accused did not have requisite intent to desert); *United States* v. *McIntyre*, 2 U.S.C.M.A. 559, 10 C.M.R. 57 (1953) (accused permitted to

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[6/] As the ACMR also noted, in some of the cases cited in its opinion, the accused's testimony and evidence on intent did not persuade the trier of fact; the important point about the cases, however, is that the accused was permitted to testify and to present all relevant evidence concerning his or her intent. (52a.)

testify that he left his unit because the army food made him sick; if believed, he had no intent to desert).

In *United States* v. *Shull*, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952), the court held the government's evidence of intent insufficient for a desertion conviction and emphasized the proof problems inherent in such cases:

> [T]he actual physical, temporal, or administrative proximity of the accused to the service in question is not important in this type of case in any ultimate sense--that is as a matter of law. These elements only function as items of circumstantial evidence raising inferences of intent of varying degrees of compulsion. It is conceivable, at least, that an absence without leave from a port of embarkation might not have been effected with a subjective intent to avoid overseas duty.

Id. at 171, 2 C.M.R. at 87.[2/] Hence, the right of one accused of

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[2/] The CAAF relied upon dicta in *Shull* suggesting that the specific intent required for a desertion conviction *may* be proven if the defendant had reasonable cause to know that he would avoid important service by his actions (33a), but this language was superfluous to the decision in that case. 1 U.S.C.M.A. at 182-83, 2 C.M.R. at 88-89. *Shull* does not stand for the proposition that specific intent is *ipso facto* proven once a defendant had reasonable cause to know that his actions would cause him to avoid hazardous duty. The defendant in *Shull* did not rely on any evidence that he acted with an entirely different intent than to avoid hazardous duty as Captain Huet-Vaughn tried to do; rather he simply argued that the government had not presented sufficient evidence of his intent to avoid hazardous duty. Thus, *Shull*'s dicta is not pertinent to this case, where Captain Huet-Vaughn was deprived of her right to present evidence to rebut the government's showing concerning her intent and where, on the basis of the excluded evidence, the trier of fact might have concluded that Captain Huet-Vaughn did not in fact intend to avoid

desertion to explain his or her subjective intent is critical.[8/]

In *Apple*, the accused testified that he left a unit engaged in hazardous duty in Korea not to avoid the duty but rather to go to the rear to "see what had occasioned the evident confusion in his records with respect to rotation points." 2 U.S.C.M.A. at 593, 10 C.M.R. at 91. On appeal from his conviction of desertion, the court ruled that

> [i]f the accused's story on the stand was true, he did not desert his unit *with intent to avoid hazardous duty*. Although he may in fact have avoided it, his object instead was to secure clarification of his confused rotation point situation.

Id. at 593-94, 10 C.M.R. at 91-92 (emphasis in original). The accused's veracity was for the fact finder to determine. *Id.* In reversing the conviction, the court stated that

> [e]ven though the evidence militating against the presence of a purpose to avoid hazardous duty came only from the lips of the accused himself, it was nonetheless fully competent to place the question of his intent squarely in issue. . . . [T]here was thus brought to the fore, as a reasonable alternative to the offense charged, the lesser included offense of absence without leave.

Id. at 594, 10 C.M.R. at 92 (citations omitted). Captain Huet-Vaughn's own testimony alone, then, could have sufficed to

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hazardous duty or shirk important service.

[8/] Indeed, it is in the *absence* of direct testimony as to the accused's intent that intent may be inferred from circumstantial evidence. *United States* v. *Taylor*, 2 U.S.C.M.A. 389, 392, 9 C.M.R. 19, 22 (1953).

show that she did not act with intent to avoid hazardous duty but rather that her "object instead" was to educate the public and to voice her concerns about the legality of the war in the Gulf. Unlike the accused in *Apple*, however, Captain Huet-Vaughn was not given the chance to explain why she went AWOL.

In *United States* v. *McIntyre*, 2 U.S.C.M.A. 559, 561, 10 C.M.R. 57, 59 (1953), the accused testified that he had left his unit in Korea because "army food made him sick and he left the forward area for that reason." The court ruled that "if the court members believed that the accused, in good faith, left his place of duty for physical reasons, there could be no finding that he absented himself without authority or that he intended to avoid hazardous duty." *Id.*[9/]

The CAAF's citation of *McIntyre* illustrates that court's error. Noting that *McIntyre* upheld a refusal to instruct that it was a defense if the accused "in good faith felt he was unable to perform his duty," *id.*, the CAAF stated wrongly that the case rested on a view that "such a defense was not raised by the evidence" and extrapolated that Captain Huet-Vaughn's "excuse for leaving her unit" similarly did not raise a defense. (35a.) In fact, the *McIntyre* decision rested on the ground that the trier of fact had necessarily decided the issue of good faith when it determined whether or not the accused "intended to avoid hazardous duty." 2 U.S.C.M.A. at 561, 10 C.M.R. at 59.[10/] Thus, in *McIntyre*, unlike the present case, the jury heard the accused's testimony as to his reasons for leaving his unit, and then determined whether or not he intended to avoid hazardous

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[9/] Because the court members obviously had not believed the accused's defense, the court upheld his conviction; nevertheless the accused was properly allowed to testify that he had an intent other than to shirk hazardous duty, and the question of the persuasiveness of his testimony was left to the jury to decide.

[10/] The court also based its opinion on the fact that the defendant at trial had not requested the instruction at issue. 2 U.S.C.M.A. at 561, 10 C.M.R. at 59.

duty. *See also United States* v. *Shepard*, 1 U.S.C.M.A. 487, 491, 4 C.M.R. 79, 82-83 (1952) (defendant could have "departed from his unit for the purpose of accumulating money by criminal means and not because he intended to avoid hazardous duty").

The facts of this case are analogous to those of *United States* v. *Cline*, 2 U.S.C.M.A. 411, 413, 9 C.M.R. 41, 43 (1953), in which the accused, having left his combat area in Korea, admitted being AWOL, but challenged the element of intent to avoid hazardous duty or important service:

> While the accused tacitly admitted the commission of the offense of absence without proper authority, a clear and distinct line of cleavage developed between the prosecution and defense case at this point. The testimony of the accused raised the issue of whether he had ever formed an intention to desert. Certainly it is possible, and probably reasonable to conclude from his testimony that the accused was motivated by combat fatigue and a genuine misunderstanding of [his commanding officer's] angry utterances.

The desertion conviction therefore could not stand. *Id.*

Captain Huet-Vaughn was explicitly barred by the military judge's order from testifying as to what specific intent she formed when she left her unit. Consequently, the members were prevented from hearing her reasons and judging her veracity. Moreover, the CAAF's decision allows future members of courts martial similarly to be kept in the dark about the intention of an individual accused of desertion. The CAAF's decision in this case is obviously incorrect; if it were not, then *Apple*, *McIntyre*, *Shepard*, and the many other cases cited by the ACMR would have been incorrectly decided. The CAAF now holds that a service member who leaves the service

in the midst of hazardous duty (i.e. while knowing that she is engaged in hazardous duty), or who leaves the service knowing that hazardous duty is imminent, necessarily intends to avoid that duty (except, perhaps, in an extreme case if the member was insensate or physically helpless when she missed the duty in question). Thus, under military law as now dictated by the CAAF, a criminal defendant may not testify in her defense on an actual element of a crime charged. It is not, however, a judge's province to decide whether a defendant's evidence may successfully rebut the government's evidence on an element of the crime; criminal defendants must be permitted to testify even if a court does not believe the testimony, because credibility is an issue for the jury to decide. While it may be that, once having *admitted* possessing the requisite intent for criminal liability, a defendant may be prevented from explaining that intent further, it is not the case that a defendant may be precluded as an initial matter from testifying that she does not have the requisite specific intent.

Not only should Captain Huet-Vaughn have been allowed to testify fully as to her intention to warn against and to avert an impending human and environmental disaster, including what she believed would be violations of international law (rather than to avoid hazardous duty), but she should also have been permitted to present evidence to support her contention that she believed international law and Nuremberg principles prohibited her from participating in violations both of international law and of her physician's oath. *Cf. United States* v. *Kelly*, 888 F.2d 732 (11th Cir. 1989). Her defense that she did not act with the intent to avoid hazardous duty was not based on the *actual* legality or illegality of the United States' actions in Southwest Asia. Rather, if Captain Huet-Vaughn herself *believed* that the United States' actions were going to be illegal, the jury could have found that she acted with the intent to comply with an affirmative obligation to withdraw her consent from the Gulf War, rather than with the intent to avoid hazardous duty.

The CAAF's decision conflates two separate elements of a desertion charge--that the accused intended to avoid hazardous duty or important service *and* that the accused knew that she would be required for such duty or service--by holding, in effect, that once the government has shown the latter, the former may simply be presumed. The CAAF, however, is incorrect in its assumption that any individual who leaves his or her unit with knowledge that the unit is or may become involved in hazardous duty is *ipso facto* guilty of desertion, and may not present evidence that he or she did not intend to avoid such duty. If this were the law, the accused in *Apple* would not have been permitted to testify that he left his unit to clear up confusion in his records and the accused in *McIntyre* would not have been allowed to testify that he left his unit because army food made him sick. Military law is patently to the contrary -- the government is required by statute to prove that an individual accused of desertion left her his or unit with the intent to avoid hazardous duty or important service -- and military cases were decided accordingly prior to the CAAF's decision in this case.

The CAAF cited an inapplicable provision explaining the elements of Article 90 of the Uniform Code of Military Justice, which proscribes willfully disobeying a superior commissioned officer, an offense with which Captain Huet-Vaughn was *not* charged. (31a.) Language quoted by the CAAF to the effect that "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order" comes from an explanation of Article 90's requirement that the order disobeyed have been lawful. M.C.M. Part IV, § 14c(2)(a)(iii). (5-6a.) The intent element of an Article 90 offense--willfulness--is described separately. *See* M.C.M. Part IV, § 14c(2)(f). (6a.)

No similar language is set forth in the manual's explanation of the elements of the offense of desertion under Article 85 of the U.C.M.J., *see* M.C.M. Part IV, § 9c(1)(d)(2), despite the fact that the manual sets forth other specific defenses which cannot be used to defeat an Article 85 offense. *See, e.g.*,

M.C.M. Part IV, §§ 9c(1)(a), (c)(ii). (3a-4a.) Had the drafters of the manual so intended, they could have prohibited under Article 85 the same defense as is prohibited under Article 90. That they did not do so is significant.[11/]

There was thus simply no precedent in military law to support the military judge's ruling or the CAAF's approval of that ruling; rather, established case law mandated that the CAAF reach the opposite result. The court's error should be corrected before its precedential effect as the holding of the highest military court permeates the military justice system.

D. The CAAF's decision distinguishes between evidence of intent and evidence of motivation behind the intent in a manner that wrongly presupposes intent has been proven.

In ruling and instructing the court members that "to consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, or personal philosophies is not a defense and testimony on the merits relating to such contentions is therefore irrelevant" (87a, 120a), the military judge presupposed that Captain Huet-Vaughn's intent to avoid hazardous duty had already been proven beyond a reasonable doubt. It has, however, always been Captain Huet-Vaughn's contention that she never in fact had the specific intent to avoid hazardous duty or important service, and that she should have been permitted to present evidence to that effect. The military judge's ruling, approved by the CAAF, thus placed the cart before the horse. If the government succeeded in establishing the requisite intent, it did

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11/ *Cf. I.N.S.* v. *Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion").

so only because Captain Huet-Vaughn was not permitted to rebut the government's showing with her own evidence that she did not act with the specified intent. Only if she had done so, however, could the trier of fact properly have determined whether it believed her or not, and then reached the ultimate determination whether the government had proven that Captain Huet-Vaughn acted with the requisite intent.

The CAAF attempted to distinguish between evidence of intent and evidence of subjective "motivations" of an accused (29-30a), stating that evidence of motive is irrelevant once intent has already been established, and holding that Captain Huet-Vaughn's excluded testimony and evidence would have constituted irrelevant motive evidence. The CAAF's distinction is false. The issue is whether Captain Huet-Vaughn was wrongly curtailed in her attempts to disprove the government's allegations about her intent; the question is not whether, *after* her intent was admitted, she should *then* have been permitted to testify as to the additional motivation underlying her intent.[12/]

In *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this Court held unconstitutional a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," *id.* at 513, specifically because the jury was not properly instructed that any such presumption could be rebutted by the defendant's evidence, *id.* at 519, 524. In the present case, Captain Huet-Vaughn was in effect precluded from rebutting the "presumption" that she intended to avoid hazardous duty simply because she left her unit when the unit was likely to become engaged in hazardous duty. The military judge's rulings and instructions not only suggested the existence of a presumption that any individual who leaves his or her unit with

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12/ The military judge ensured that the jury would not be aware of his conflation of the separate issues of intent and the explanation for that intent when he refused to charge the members of the court that there could be no conviction if Captain Huet-Vaughn did not intend to avoid hazardous duty or to shirk important service. (120-21a.)

the knowledge that she might be required for hazardous duty does so with the intent to avoid hazardous duty, but by ruling that Captain Huet-Vaughn should not have been permitted to testify herself or submit supporting evidence to show that she did not have this intent, the CAAF's decision permits military courts to apply the impermissible conclusive and irrebuttable presumption at issue in *Sandstrom*. This Court has held, however, that "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue." *Id.* at 84. *Cf. United States* v. *Huff*, 7 U.S.C.M.A. 247, 250, 22 C.M.R. 37, 40 (1956) (with respect to a desertion charge based on the specific intent to remain away permanently, "to preclude the accused from contesting the question of his intent to desert because he admits [reenlisment in another branch of the armed forces], is tantamount to creating a conclusive presumption of an intention to remain away permanently from the fact of reenlistment. Such a presumption is illegal"). A directed verdict is unquestionably improper in a criminal prosecution. *Connecticut* v. *Johnson*, 460 U.S. 73, 84 (1983)

2. The Restrictions Placed In This Case Upon The Accused's Ability To Present Evidence Of Her Intent Were Not Harmless.

The dissenting judge of the CAAF, while holding it error for the military judge to have excluded Captain Huet-Vaughn's testimony and other evidence concerning her intent, believed that "CPT Huet-Vaughn was not prevented from explaining her reasons for leaving her unit to the members" and that the error was therefore harmless. (37a.) It is not possible, however, to determine after the fact so definitively (if at all) what effect Captain Huet-Vaughn's full testimony, coupled with the supporting evidence of other witnesses, would have had on the jury. Nearly every time Captain Huet-Vaughn attempted to testify concerning her intent when she left her unit, the government's objection was sustained and, as the ACMR found,

Captain Huet-Vaughn was at most permitted to present only a "sketchy summary" of her intent. (47a.)

The CAAF judge's suggestion that the military judge's evidentiary rulings were harmless error because Captain Huet-Vaughn somehow managed to present her defense through her own drastically curtailed testimony is an absurd assertion in itself; Captain Huet-Vaughn was simply not allowed to testify fully as to what was in her mind when she left her unit.[13/] This suggestion is even weaker in light of the military judge's instruction to the jury that it could not consider evidence of

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[13/] Relying on instances where Captain Huet-Vaughn managed to testify briefly as to her intent despite the military judge's rulings *in limine* and the prosection's objections, the CAAF stated that "[c]onsiderable evidence was admitted regarding CPT Huet-Vaughn's moral, ethical, philosophical, and legal objections to the Persian Gulf war." (28a.)

Captain Huet-Vaughn's testimony, however, must be taken in the context of the numerous prosecution objections whenever she attempted to explain her intent, and the fact that defense counsel could not base his opening or closing statements on what Captain Huet-Vaughn's specific intent actually was at the time of the alleged offense. Indeed, the only statement defense counsel was able to make about Captain Huet-Vaughn's intent was a negative -- that she did not have culpable intent but not what intent she did have -- in his opening statement: "[W]e maintain to you that we will prove to you, if permitted to do so, that this lady's specific intent in refusing to go to the Persian Gulf was not for the purpose of avoiding hazardous duty or shirking important service." (92a.) In response, the military judge told the court members that he would "comment briefly on the opening statement" and instructed them that, "[t]o consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's . . . conscience, religion or personal philosphies is not a defense." (93a.) As the ACMR held, Captain Huet-Vaughn was at most able to adumbrate a sketchy picture of her intent. The military judge then compounded the error by instructing the court members to disregard the meager evidence that Captain Huet-Vaughn managed to introduce regarding her intent. *See Morissette* v. *United States*, 342 U.S. 246, 249, 263, 274 (1952) (it was error to "refuse[] to submit to or allow counsel to argue to the jury whether [the defendant] acted with innocent intention").

Captain Huet-Vaughn's "conscience, religion, personal philosophy, [or] ethical or professional considerations."[14/] (120a.) Because Captain Huet-Vaughn's limited explanation of her intent centered on matters of her conscience, her religious beliefs, her professional and ethical codes and her personal philosophy, it must have been clear to the court members that this instruction meant they were to disregard whatever scant testimony Captain Huet-Vaughn was able to give concerning her intent. Thus, the fact that she might have managed, over objection, very briefly to articulate her opposition to the war in the Gulf in general (although she was never allowed to testify as to her intent at the time she left her unit) is not relevant here; any such evidence was rendered ineffective by the judge's instructions. Indeed, the CAAF itself held that, "in effect, the members were told to disregard" any evidence concerning Captain Huet-Vaughn's beliefs or philosophy when deliberating the merits of the case. (33a.)

Thus, the military judge not only excluded the most relevant evidence of Captain Huet-Vaughn's specific intent at the time of the alleged crime--her testimony--but compounded the error by instructing the jury not to consider any evidence of her intent other than that presented by the prosecution.

Finally, even if the government was correct that significant evidence of Captain Huet-Vaughn's defense was presented despite the military judge's rulings, which Captain Huet-Vaughn disputes, the error would not be harmless. Where, as here, the only contested issue in a case is intent, and excluded evidence relates to that "determinative issue," any duplicative aspect of evidence is not needless and exclusion of the evidence cannot be held harmless. *United States* v. *Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993). *See also United States* v. *Biaggi*, 909 F.2d 662, 692 (2d Cir. 1990) ("[w]here evidence of a defendant's state of mind, critical to a fair adjudication of

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14/ The ACMR noted that this instruction deviated from the standard instruction. (48a.)

criminal charges, is excluded, we have not hesitated to order a new trial"), *cert. denied*, 499 U.S. 904 (1991).

In *Connecticut* v. *Johnson*, 460 U.S. 73, 85-86, this Court held that an erroneous instruction suggesting a presumption of intent to a jury was not harmless error, because "[i]f the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict." In Captain Huet-Vaughn's case, because the military judge not only instructed the trier of fact to disregard evidence of Captain Huet-Vaughn's intent, but refused to allow Captain Huet-Vaughn even to present her evidence on the question of intent, the court members' failure "to consider evidence of intent" was ensured. This error, which has serious implications for future desertion defendants, cannot therefore be harmless.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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